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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

RESPONSE OF CABLEVISION SYSTEMS CORPORATION TO PETITIONS FOR RECONSIDERATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits comments in response to several pending petitions for reconsideration of the Commission's Report and Order and Further Notice of Proposed Rulemaking, released May 3, 1993, in the above-captioned proceeding ("Report and Order").

In support of those petitions, the comments herein demonstrate that the benchmark formula adopted in the Report and Order is unsuitable for determining the reasonableness of rates for cable programming services. As applied to tiers above the basic service tier, that formula will likely prevent operators from recovering the costs of constructing and operating the facilities necessary to provide cable programming services and will discourage operators from adding additional channels of programming. Additionally, the mechanical application of the formula to calculate the rates for commercial as well as residential subscribers could unfairly deprive operators of the ability to recover some of the value that

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commercial subscribers derive from offering cable service to their patrons, resulting in a windfall to those subscribers.

For these reasons, the Commission should reconsider its decision to apply the benchmark formula on a "tier neutral" basis and limit its applicability to establishing rates for the basic service tier. Consistent with the language and intent of the 1992 Cable Act, rates for cable programming services should not be subject to the same stringent standards applicable to the basic service tier.

I. APPLYING THE BENCHMARK SCHEME TO CABLE PROGRAMMING SERVICES WILL PREVENT OPERATORS FROM RECOVERING COSTS AND DISCOURAGE THEM FROM ADDING NEW CHANNELS OF SERVICE

Cablevision concurs with the National Cable Television Association ("NCTA") and other petitioners who argue that the Commission's "tier neutral" benchmark scheme will create strong financial disincentives to provide cable programming services.[1/] For reasons that have been fully presented to the Commission,[2/] such an approach is neither compelled nor justified by the 1992 Cable Act.[3/]

[1/] See, e.g., Petition for Reconsideration, National Cable Television Association, Inc. at 10-17 (filed June 21, 1993) ("NCTA Petition"); Petition for Reconsideration of Tele-Communications, Inc. at 27-30 (filed June 21, 1993) ("TCI Petition"); Petition for Reconsideration of Time Warner Entertainment Company, L.P. at 12-13 (filed June 21, 1993).

[2/] See, e.g., NCTA Petition at 3-9; Petition for Reconsideration, Cablevision Systems Corporation at 10-11 (filed June 21, 1993).

[3/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

Whatever the value of using the Report and Order's benchmarks to determine the rates for an affordable "entry level" package of basic service, their imprecision and arbitrariness[4/] make them unsuitable as a basis for regulating cable programming services. Cablevision is particularly concerned that the Commission's benchmarks will deny operators the ability to recover the costs of providing such services.[5/] The Commission has found that the allowable per channel rate should decline as the number of channels increases, based on its analysis of the data before it, concluding that the addition of channels provides operators with increased resources to meet capital costs and overhead expenses.[6/] This conclusion is true only to the extent that subscribers actually purchase the tier of services provided on these additional channels. There is no assurance, however, that subscribers will actually do so.

Prior to adoption of the 1992 Cable Act, cable operators could ensure a reasonably predictable subscriber base for a new tier of service by requiring purchase of the new tier as a condition of access to premium services. That predictability underlies the statistical evidence suggesting that per channel rates declined with the addition of new channels, since revenue from the additional channels could be counted on to fund the necessary capital

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[4/] Because they are based on the rates of only approximately 100 systems that face "effective competition," as defined under the 1992 Cable Act, the benchmarks adopted by the Commission are an "imperfect, imprecise and inherently arbitrary measure of 'competitive' rates." NCTA Petition at 10. As NCTA has explained, the Commission's sample of systems is flawed and the benchmark calculations are based on invalid and oversimplified assumptions. Id. at 10-17.

[5/] Cf. id. at 16-17.

[6/] See Report and Order, Appendix E at ¶ 27.

investment and programming costs. Effective October 6, 1993, however, operators can no longer require subscribers to purchase any tier other than the basic tier in order to obtain per channel or pay-per-view programming.[7/] Operators simply have no assurance that tiers of cable programming services will be purchased, and thus no way of knowing whether additional channels will provide revenues sufficient to compensate for the reduced per channel rates that are dictated by the benchmark formula.

Application of the benchmark formula to cable programming services will also effectively preclude the addition of new channels to service tiers. Even assuming arguendo that the benchmark per-channel rates should decline as the number of channels on a system increases, they decline too precipitously under the tables established by the Commission.[8/] As a result, systems adding new channels will be unable to charge enough to cover capital investments, programming costs and other expenses that would be incurred to upgrade the system and offer the new services.

These points are illustrated by reference to benchmark-derived rates for Cablevision's Boston system. That system provides service to more than 125,000 subscribers and offers a basic service tier, a 33-channel tier of cable programming services, and a 23-channel tier of cable programming services. Under the Commission's benchmark scheme, the maximum permitted per channel rate is $0.32. Thus, the maximum permitted rate for the basic tier and the first tier of cable programming services is $17.25; the maximum permitted rate for all three tiers of service is $24.83. Prior to enactment, only

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[7/] See 47 U.S.C. § 543(b)(8)(A).

[8/] See NCTA Petition at 16.

subscribers who purchased all three tiers had access to per channel or per program services. Given the buy-through prohibition, however, it is possible that subscribers will drop the second tier of cable programming services, reducing Cablevision's revenues. Without that revenue, the rate for the first tier of cable programming services may be inadequate to support the costs of a 75-channel system.

If the Boston system did not offer the second tier of cable programming services, leaving a total of 52 regulated channels including 29 satellite channels, the maximum permitted per channel rate would be significantly higher -- $0.40 -- and Cablevision would be able to charge $21.47 for the most expensive regulated service. The addition of 23 channels, in other words, yields at most an additional $3.36 -- or less than $0.15 per channel for the additional channels.

If Cablevision had only 52 channels on its Boston system today, it would have little incentive to add the extra 23 channels given the constraints imposed by the benchmark formula. A return of $0.15 per channel is simply insufficient to cover the costs of programming and plant upgrade necessary to add new programming to the line-up.[9/] With

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[9/] The incremental revenue of $0.15 per channel, which is derived using the Commission's benchmark tables, assumes that those tables would be used to calculate new rates to reflect the addition of channels to regulated tiers. The Commission has not definitively stated how operators should account for channels added after they become subject to regulation, however. The Report and Order suggests that operators that add channels may be limited to annual increases calculated by reference to the GNP-PI and the "external" factors enumerated therein. See Report and Order at ¶¶ 227-229, 240-41. These increases would compensate operators only for routine increases in the cost of doing business plus increases in programming costs. An operator would have little if any financial incentive to make the investment in plant necessary to add new channels to service tiers.

the addition of the buy-through prohibition by the 1992 Cable Act, moreover, it is uncertain how much of this limited additional revenue Cablevision would even realize.

Because it prevents cable operators from adding new channels to service tiers, the Commission's "tier neutral" benchmark scheme is fundamentally at odds with the 1992 Cable Act's stated policy to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems."[10/] Ultimately, the quality and quantity of cable programming services will be adversely affected by the broad application of the benchmark formula, depriving the consumers of the widest diversity of programming choices.[11/]

II. THE COMMISSION'S BENCHMARK SCHEME COULD LIMIT THE ABILITY OF OPERATORS TO RECOVER THE VALUE OF CABLE SERVICE PROVIDED TO COMMERCIAL ESTABLISHMENTS

Although the Report and Order authorizes operators to provide discounted service under particular circumstances,[12/] it is unclear whether the Commission's regulatory scheme requires operators to charge commercial establishments, such as bars and restaurants open to the public, the same rates charged to residential subscribers. The effect of a policy requiring such identical rates, which is neither compelled by the 1992 Cable Act

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[10/] 1992 Cable Act, § 2(b)(3).

[11/] Cf. TCI Petition at 28 (noting that the "response to overly aggressive rate regulation of [cable programming] services is curtailment of delivery of new services").

[12/] See, e.g., Report and Order at ¶¶ 423-424. The Commission correctly determined that the Act's requirement of a uniform "rate structure" does not mandate a uniform rate for all services and classes of customers. Id. at ¶ 423.

nor justified on policy grounds, would be to confer a windfall on commercial subscribers at the expense of cable operators.

Unlike residential customers, commercial establishments often derive a direct and substantial financial benefit from their subscription to cable services. These establishments often add cable television -- and advertise its availability -- to draw additional customers and increase their patronage. If they were unable to charge commercial establishments more than they charge residential customers, however, cable operators would be precluded from recovering any portion of the benefit realized by these establishments from their cable subscriptions.[13/]

The provision of cable services by commercial establishments can also drain business away from cable operators, moreover. To the extent that consumers can watch ESPN or Home Team Sports at a bar, for example, they may not subscribe to cable at home. Unless cable operators can recover this lost revenue by charging the bar at a level above the benchmark-derived rate, their ability to earn a reasonable profit may be impaired.

[13/] A number of cable programmers likewise charge operators different rates for commercial and residential subscribers, reflecting the commercial benefit derived by "sports bars" and other commercial establishments from the exhibition of cable programming. Differential charges for service provided to commercial subscribers would no longer be feasible, resulting in a revenue loss for programmers, if operators could not set commercial subscriber rates at a level to recoup programmer charges. In effect, bars and restaurants would benefit at the expense of programmers. Nothing in the 1992 Cable Act compels such an outcome.

The statute simply does not require imposition of the same rate with respect to commercial as well as residential subscribers.[14/] The 1992 Cable Act directs only that service tier rates be "reasonable" or not "unreasonable."[15/] For the reasons set forth above, however, what is a reasonable rate for residential subscribers may amount to a windfall for commercial subscribers. The Commission's rules should make clear that commercial rates are not included within the benchmark scheme. Commercial establishments that believe their cable rates are unreasonable can file a complaint with the Commission.[16/] In evaluating such a complaint, however, the Commission should take into account the vastly different purposes for which commercial and residential subscribers utilize cable service. Relief would be appropriate only if rates are found unreasonable in the context of the commercial use of cable services. Forcing cable operators to charge commercial establishments the same rates to which residential subscribers may be entitled would impose an additional and unnecessary financial strain on operators.

[14/] In enacting the 1992 Cable Act, Congress was primarily concerned with the rates charged to residential subscribers. See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 8 (expressing concern that "only a small percent of the cabled homes" were protected by rate regulation under the Commission's 1991 definition of effective competition) (emphasis added); H.R. Rep. No. 628, 102d Cong., 2d Sess. 29-30 (discussing the number of "households" served by cable and its competitors). Because commercial subscribers can typically afford to purchase satellite earth stations to access programming, as an alternative to subscribing to cable service, they have greater bargaining power and more options available to them than do residential subscribers. Prior to enactment of the 1992 Cable Act, many commercial subscribers obtained cable service under the terms and conditions of contracts individually negotiated with operators.

[15/] See 47 U.S.C. § 543(b)(1), (c)(1)(A).

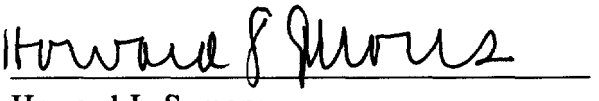
[16/] See 47 U.S.C. § 543(c).

CONCLUSION

Consistent with the foregoing and for the reasons stated therein, the Commission should reconsider the Report and Order and limit the applicability of the benchmark scheme to the offering of the basic service tier to residential subscribers.

Respectfully Submitted,

CABLEVISION SYSTEMS CORPORATION



Howard J. Symons
Leslie B. Calandro
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Its Attorneys

Of Counsel:

Robert S. Lemle
Senior Vice President
and General Counsel
Cablevision Systems Corporation
One Media Crossways
Woodbury, NY 11797

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CERTIFICATE OF SERVICE

I, Leslie B. Calandro, do hereby certify that copies of the foregoing Response of Cablevision Systems Corporation to Petitions for Reconsideration were served on the following by either hand delivery or first class mail, postage prepaid, this 21st day of July, 1993.

Leslie B. Calandro

*Chairman James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

*Commissioner Andrew C. Barrett

*Alexandra Wilson
Special Assistant to Chief
Mass Media Bureau for Cable Television
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, DC 20554

Aaron Fleischman
Charles S. Walsh
Fleischman and Walsh
1400 16th Street, N.W., Suite 600
Washington, DC 20036
Attorneys for
Time Warner Entertainment Company, L.P.

Philip L. Verveer
Sue D. Blumenfeld
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W., Suite 600
Washington, DC 20036-3384
Attorneys for
Time Warner Entertainment Company, L.P.

*By Hand
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